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ABSTRACT

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Special Report #9

The "No Agent" Vote at N.Y.U.: A Concise Legal History

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This article deals with the historical and legal elements surrounding the unsuccessful attempt at faculty unionization at New York University. Of particular import are the issues surrounding unit inclusions and exclusions, especially the exclusion of part-time faculty. Another important consideration was the active campaigning of the U.F.C.T. and A.A.U.P. and the anti-union organizations. While the article deals with the legal history of faculty unionization at N.Y.U., issues of broader legal and practical implication are outlined and discussed, along with the possible consequences of various decisions by the National Labor Relations Board and the courts.

The recent faculty unionization campaign at N.Y.U. is regarded as one of the most significant events in this year in collective bargaining on the nation's campuses.(1) Because of the interest expressed, I have sought to sketch herein the legal history of the N.Y.U. case with a stress upon those factors that I believe were particularly influential in determining the final outcome.

It should be understood at the outset that the goal of a labor law "team" for a party in an election situation is essentially to gain the best strategic position;(2) in particular, that means seeking to realize desired inclusions and exclusions from the unit and obtaining the most advantageous election conditions. In addition, labor lawyers seek to assure that campaign strategy--including pre-election distributions to the electorate--

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is not only permissible but is also appropriate, effective and timely; that is to say, is "on target." Such campaign strategy, along with voting provisions sought in the administrative proceedings, can greatly help to accomplish another important aim; namely, maximizing desired voter turnout.

The Representation Proceedings Begin:

The representation proceedings just ended at N.Y.U. were formally commenced on September 16, 1971 when the N.Y.U. Chapter of the American Association of University Professors filed a petition for an election with the National Labor Relations Board. Both the union and the forum involved are a matter of some history. Over a year before, in March of 1970, the United Federation of College Teachers had filed a petition for the N.Y.U. faculty with the New York State Labor Relations Board. That petition was winding its way through the State Labor Board's administrative procedures when it was rendered moot by the National Board's decision in Cornell University, 183 NLRB 41, pre-empting jurisdiction over the overwhelming majority of private colleges and universities.(3) Interestingly, this changeover of jurisdiction would ultimately have an even more profound effect than could be realized at the time, for had the same voting results as subsequently occurred been before the State Board, the University would have either the A.A.U.P. or U.F.C.T. as its certified bargaining agent.(4)

Of course, the U.F.C.T. had the option of then filing a petition with the National Board. The National Board's rules, however, unlike the State's, require that the petition be accompanied by a 30% showing of interest.(5) While the U.F.C.T.'s desire to represent the N.Y.U. faculty was already clear, it strongly appears that it had not yet amassed the necessary rumber of authorization cards for a National Board petition. The A.A.U.P., however, had collected by September of 1971 not only the required number of cards but, I have good reason to believe, a substantially larger number.(6) As soon as the A.A.U.P. filed as the petitioner before the National Board, the U.F.C.T. moved to intervene.

The U.F.C.T.'s intervention immediately raised several interesting legal questions. For one thing, the U.F.C.T. took the position from the outset that it sought to represent a unit combining N.Y.U.'s part-time/adjunct faculty along with the full-time faculty and insisted, on the basis of a considerable number of prior NLRB decisions that, in the absence of a stipulation of all "parties" to exclude part-timers, the unit must be so defined. Query: Did the U.F.C.T. have the legal standing to maintain that position? The answer seemed to depend on which category of "parties", as each is defined by the Board's rules, the U.F.C.T. fell within, for each category has a significantly different showing of interest requirement. One of the University's contentions was that a unit including part-timers was one that so "differed in substance from that claimed appropriate by a Union-Petitioner," that the U.F.C.T. could only seek that unit if it

achieved the status of a "cross-petitioner." To maintain this status required a 30% showing of interest in the sought unit, which the U.F.C.T. was unlikely to then have. The University also set up a second basis for contesting the U.F.C.T.'s position. During the course of the hearings, the University decided that it would enter into a "stipulation" with the A.A.U.P. excluding part-timers. After some initial disbelief and suggestions from the U.F.C.T. that perhaps there was a communications difficulty, this was done, thus raising the issue of whether the U.F.C.T. had the standing to block a "stipulation." The University argued that to do so required the U.F.C.T. to at least have the status of a "full intervenor" which required a 10% showing of interest and not merely that of a "limited intervenor" which requires much less of a showing. For the time being, both these contentions have been rendered moot by the Board's decision in the N.Y.U. case to exclude part-timers on the basis of the unit argument. The issues raised with regard to an intervenor's standing, however, may well be raised again in the context of various other unit issues that have not yet been satisfactorily resolved.

I would note in passing that two other important issues pertaining to party standing appear to have been resolved by the Board. As to a petitioner, the question has arisen whether the showing of interest will be considered adequate where it represented 30% of the unit stated in the petition but turns out to represent less than 30% of what the Board ultimately determines to be the appropriate unit; i.e., as the result of unit enlargement due to the inclusion of groups not sought in the original petition. The answer is apparently no, and the Board has made its direction of election in modified units conditional on the petitioning union's ability to produce a 30% showing of interest in the unit as modified.(7) On the other hand, the Board has so liberally interpreted its rules for allowing interventions, that it allowed a union to intervene (assumedly as a limited intervenor) in a unit of several hundred faculty members at Manhattan College on the basis of a very limited number of authorization cards and perhaps as few as a handful.(8) Such a rule not only may tend to instigate a flood of unwarranted interventions but also, unless and until the intervening union's right to seek a different unit or block a stipulation is clarified, may cause significant modifications in the unit and/or election details by a party with relatively little legitimate interest in the outcome.

The Board Reverses Itself on Part-Timers

Undoubtedly, the most far-reaching implication of the N.Y.U. case for other colleges and universities concerns the issue of part-time/adjunct faculty. Their inclusion not only would result in a very substantial change in the size of many faculty units (indeed, it would have "swamped" the full-time faculty unit at N.Y.U.). In various schools, it might also result in a notable shift in the propensity for unionization or for unionization by a particular union such as the U.F.C.T., the group that at N.Y.U. was demanding part-time inclusion and had undoubtedly already made inroads in acquiring their support.

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While the U.F.C.T. was alone in the N.Y.U. case in seeking part-timers, it had more than enough reason to be optimistic about the result. By the time N.Y.U. was decided, there were twelve Board decisions on part-timers and in every single decision, the Board had upheld its policy of including part-timers.(9) Indeed, while the Board had initially announced a policy of dealing with unit issues involving college and university faculties on a case-by-case basis,(10) it had already reached what was clearly a sweeping rule on part-timers. As the Board stated in University of New Haven, "...absent a stipulation of the parties to the contrary, only a unit of full-time and regular part-time professional employees is appropriate."(11)

To overcome such precedent, the University's Brief sought to establish two concepts: First, that the Board should not feel itself bound by the precedent since the relationship between full-time and part-time faculty at N.Y.U. was markedly different than at the overwhelming majority of less complex or less mature private colleges and universities. Secondly, that at least at N.Y.U., the part-time faculty had an insufficient community of interest to be included with full-time faculty. On this latter point, the University sought to make clear not only the differences in the usual economic indices of community of interest--a substantial percentage of part-timers receive from the University only a modest sum (comparable to an honorarium), while their primary source of income is elsewhere; part-timers, unlike the full-time faculty, are ineligible for fringe benefits; the workload and other working conditions of the two groups are substantially different. But equally important the University sought to emphasize the differences whose vast importance could only be understood in an academic context. Thus, while the Board had in those prior decisions noted in passing that part-timers were generally ineligible for tenure, the University maintained that in the academic setting at N.Y.U. tenure eligibility is surely one of the most critical determinants of categorization and interest. In another vein, designed also to emphasize the uniqueness of N.Y.U., the University sought to demonstrate that one of the major responsibilities and functions of a full-time faculty member at a mature university is to participate in university governance, while so important a function was largely inapplicable to N.Y.U. part-timers. Probably most novel to the Board, the University suggested that its most commonly stated premises for lumping together part-timers and full-time faculty--namely, that both groups were essentially limited to the same function, i.e., teaching--while true in the typical campus situation, was simply not the case at N.Y.U. Here, full-time faculty unlike part-timers were fully engaged in and compensated for tripartite responsibilities not only in teaching but also in scholarly research and university citizenship functions.(12)

In its decision to exclude part-timers, the Board adopted each of the points set forth above as indicative of the fact that there is no real mutuality of interest between the part-time

faculty at New York University," and then repeated the factual divergencies referred to in the University's Brief.(13)

As for the decision itself, it has had a profound effect on other colleges and universities.(14) Yet, that effect has so far been somewhat curious. Indeed, if the Board's intention is to now exclude part-timers at all other schools without consideration of the factual similarities of those institutions to the N.Y.U. case, it would be adopting what amounts to the exact opposite of its previous rule on part-timers and applying that rule in an equally inflexible manner, ignoring in the process the University's original proposition that the situation at N.Y.U. may not be common to all institutions of higher learning.

Because there is the distinct possibility that the Board, for various reasons, will reconsider whether it wishes to apply the N.Y.U. decision to part-timers at every other school, let me suggest some additional unresolved issues that would then arise. Under its previous policy, the Board was truly struggling with how to define part-timers; that is, which part-timers had a sufficient degree of employment to be defined as "regular" part-timers and included in the unit and which among those had a sufficient continuity of employment to be permitted to vote.(15) The Board, beginning with its decision at Detroit, posited a one-to-four standard. In a primarily teaching institution with standardized class requirements this was at least possible of application, although it left many technical questions still unresolved.(16) Essentially, one measured the average teaching hours of the full-time faculty and then included all part-timers who taught at least one-fourth as many hours. The Board took account of distinctions between various schools within a university in certain cases and therefore applied the one-to-four standard on a school by school basis.(17) But it did not do so uniformly and appeared not to have yet reasoned through on just what basis the formula was best applied in a given situation; that is, whether the averages be computed department-wide, school-wide, campus-wide, or university-wide, to name the most obvious options. While such technical distinctions undoubtedly could have been worked out with relative ease, N.Y.U. posed an even more basic problem. The Board's underlying premises in establishing a ratio was to include only those part-timers with a relatively "substantial and continuing interest" in the work of the unit.(18) To base that ratio on teaching hours may be quite logical at a primarily teaching institution. On the other hand, the University suggested in the N.Y.U. case that at a mature and complex university, where the full-time faculty spends a substantial portion of its working time in functions such as scholarly research and citizenship activities, the formula must be based on total working hours and not merely teaching hours. As everyone familiar with a modern college campus is aware, the resolution of this issue has a distinctly practical implication. Applying the one-to-four ratio against teaching hours results in the inclusion of the great majority of part-timers; applying it against total hours results in the exact opposite.

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With regard to sufficient continuity of employment to justify enfranchisement, the Board issued various clarifications and refinements. Finally it determined that those unit members entitled to vote included all part-timers who met the required hour ratio in the semester in which the election was held (whether or not they were there in prior semesters) plus any additional part-timers who met the required hour ratio in at least one semester of at least two of the last three academic years, including the year in which the election was held.(19) Beyond such questions as whether this formula is the best index of the likelihood of continued employment, there remains an essential legal issue that might well reach constitutional dimensions. To determine that every part-timer who meets the hour ratio is included in the unit (and therefore subject to the exclusive bargaining jurisdiction of a successful union) but that only those among this prior group who also meet the formula for continuity are entitled to vote may well constitute an improper denial of the franchise. Obviously some part-timers who stand to have their basic economic interests affected will not have the opportunity to vote on the question of representation. While one might have been tempted to feel that the Board's adoption of the University's basic argument rendered all the issues the University posed in the brief with regard to the definition of part-timers as mere surplusage, the Board's footnoted comment is instructive. As they said in explaining their reversal: "We have also been influenced by the Board's inability to formulate what we regard as a satisfactory standard for determining the eligibility of adjuncts in Board election."(20) It is an admission that may well have significant future implication.

There are, of course, a number of other potential issues concerning part-timers that I have not discussed. I will note just one in passing. As the Board said in a footnoted reference in the N.Y.U. decision," ...we express no opinion as to whether a unit of part-time faculty is appropriate."(21) Thus far, no unit limited to part-time faculty has, to my knowledge, been sought at a private college or university. It is entirely likely that this will change as unions seek such units either as ancillaries to a represented full-time faculty or as a means of securing a place on campus anticipatory to moving for the full-time faculty. When that happens, interesting questions of a legal, as well as practical, nature will surely arise.

Librarians: Unit Inclusion And Supervisory Exclusion

To underline the usual effect of substantial precedent, let me briefly relate the history of the unit issue concerning librarians. By the time of the N.Y.U. decision, there were already four cases in which the unit status of professional librarians had been placed before the Board and, in every case, the Board had ruled to include such librarians in the unit.(22) While the Board unquestionably has great leeway in deciding unit issues,(23) and while the factual circumstances were generally analogous to those at N.Y.U., what was nevertheless disconcerting was that the Board's decisions on this point seemed to rest largely on its finding that librarians

were, after all, professionals. Indeed, one sensed that the Board was saying that professionalism is so distinguishing a characteristic, as undoubtedly it is in a non-academic framework, that inclusion should be permitted for all professionals sought to be represented.

The N.Y.U. Brief pointed out that distinctions of a substantial and not yet fully appreciated nature existed between various groups of professionals in an academic setting, not only with regard to their terms and conditions of employment, but also with regard to how they viewed each other. Interestingly, the Board's decision adopted all the University's factual contentions, listing in the decision the numerous disparities between faculty and librarians. One sentence of their opinion is illustrative: "Further distinguishing librarians from faculty are their regular workweek; retirement age; tenure requirements; separate grievance procedure; lack of proportional representation in the University senate (. . .) and, perhaps more basically, the fact that they were not considered faculty."(24) However, the Board was not yet prepared to change its unit "rule" on librarians. Thus, the final two sentences of their opinion: "On the other hand, they [librarians] are a professional group... We conclude that they possess a sufficient community of interest to be included in the unit as a closely allied professional group whose ultimate function, aiding and furthering the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner."(25)

It must be pointed out that such a standard for unit inclusion, namely allied professionalism and some role in furthering a university's educational and scholarly goals, could justify the inclusion of virtually every ancillary support group on campus, whether it be such apparently divergent groups as computer operators, accountants in the treasurer's office or research scientists. This is a result that I do not believe the Board has fully contemplated and may well not intend to allow to occur. It is also possible that the Board was simply unwilling at that point in time to again reverse itself is an issue in which a substantial body of precedent had built up. A great deal of light may be shed on these conjectures in the not too distant future, for in a case now pending involving Fordham University, this issue is being raised again.(26)

An issue that at first glance appears tangential, but may yet have even greater legal implications, concerns the supervisory status of certain librarians. Taking a cue from a Board comment in Adelphi dealing with the supervisory status of a director of admissions relative to his authority over his non-unit secretary,(27) the University posed in their Brief the same issue in the context of professional librarians; namely, must a supervisory exclusion be granted to any unit member who possesses supervisory authority over any other employee of the employer (whether or not such employee is also a unit member) and without regard to the percentage of time spent in exercising such supervisory authority. The

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Board's answer was identical to that it had given in Adelphi: "... we shall exclude as supervisors only those professional librarians who supervise other employees in the unit or who spend more than 50 percent of their time supervising non-unit employees."(28) The issue was now framed in a manner that would permit judicial review, a subject I shall turn to briefly. I would just note at this point that even following the limited definition of supervisors thus far permitted by the Board, about one-third of the potential group of librarians has been excluded from the unit.

The Law School: A Separate Unit With Broad Implication

In addition to the usual motives for unionization, another one may be becoming increasingly apparent on university campuses; namely, the desire of a particular faculty in a better-than-average position, to get out from an all-encompassing university unit that it fears will cause a leveling off of their unique position. This has particularly been the case with law schools.

Thus, as at various other institutions, the petition for representation of the overall unit at N.Y.U. was shortly followed by an intervention from a recently formed local association seeking to separately represent law school faculty. And as at Fordham, Catholic, and Syracuse Universities before the N.Y.U. case, and at University of San Francisco subsequently, the Board has permitted such a separate unit for the law faculty.(29)

What has changed, however, is the rationale offered by the Board and the novel method for determining the final unit. Beginning with the Syracuse decision and applied shortly thereafter at N.Y.U., a three-member majority of the Board decided that either a separate or overall university-wide unit would be appropriate and the members of the law faculty were to be given the option of voting on whether they wished to have a separate or overall unit and whether or not they wished to be represented in either such separate or overall unit.(30)

Almost as fascinating as the methodology are the reasons for its introduction. The Board suggested that there exists in the academic community a special, perhaps "intellectual allegiance" to "a particular discipline. This allegiance may transcend shared interests in the economic benefits and the conditions of employment ..."(31) Many questions can be raised about the Board's approach. Should unit determinations reflect admittedly non-economic factors such as "intellectual allegiance"? How does one measure "intellectual allegiances" and is the Board in a position to make such measurements which surely require intimate familiarity with a broad range of academic disciplines? What happens if the allegiance is to a discipline more limited than an entire school (such as a department or division)? Was the Board in fact sympathetic to the obvious concern of members of their own profession over such matters as the potential labor strike called by an overall unit and, if so, should such concerns have any place in unit determinations?

Whatever the Board's sympathies, however, they clearly set up what may be the classic Pandora's Box. In their earlier decision in Fordham, the Board suggested in a footnote that the factors permitting such unit segmentation were "equally applicable to the University's other professional schools."(32) And in Syracuse, as though to emphasize the broad potential of their decision, they gratuitously offered that "The same is undoubtedly true of other disciplines, most particularly those requiring work at the graduate level to prepare for specialized areas of endeavor--as opposed to purely scholarly or intellectual pursuits. Such disciplines, more practical than intellectual, identifiable--we anticipate--by the relationship between their academic and practicing colleagues, are, at once, part of the academic world and foreign to it and to each other."(33) In fact, the only clear limitation on segmenting out a particular school appears to be that some labor organization must be willing to separately represent its members and a mere request by one party to exclude a school from an overall unit will not do.(34)

The full implication of this Board approach remains to be seen. At the same time the Board appears to be adhering strictly to its earlier determinations in non-faculty cases to avoid campus-by-campus fragmentation,(35) the Board seems to be increasingly willing to permit and even invite fragmentation along disciplinary lines, which I believe is now conceived of as potentially applying to various graduate and professional school units but could yet mean an even more finite breakdown. From a legal standpoint, despite the Board's broad discretion in determining bargaining units, the methodology they have chosen--namely, a voter's option--raises some substantial questions to which I will return in the section on judicial review. For the moment, I needn't overemphasize the practical implications of such school fragmentation to any university administrator. Not only does it raise the possibility of "whipsaw" bargaining, but it obviously diminishes the likelihood of a rejection of unionization in the overall unit.(36)

An Assortment of Other Unit Issues: Faculty on Terminal Contract, Principal Investigators, Department Chairmen

During the course of the hearings, several other unit issues were raised. As Manhattan and Tusculum Colleges had before us, the University raised the issue of whether faculty members on terminal contract should be excluded from the unit since they lack "a community of interest in the long-range responsibilities and relationships which unite the rest of the faculty." And as in Manhattan and Tusculum, the Board, applying its traditional rules on prospective separations, ruled that as long as such persons were still on the faculty at the time of the election, they were entitled to vote.(37) Some results, however, occur in roundabout ways. Had the N.Y.U. election been held in the usual period of time following the filing of the petition or even in the subsequent academic year, a very substantial number of faculty members on terminal contracts would have been eligible to vote. Since the Board's processing of the N.Y.U. case took over two years, the number of faculty on terminal contracts was reduced to a small fraction of the previous number and a sizable group of undoubtedly pro-union votes was thereby eliminated.

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The University also raised the question of whether principal investigators should be excluded from the unit because of their supervisory authority over faculty members working under them on their specific projects. In its Fordham decision, the Board held that principal investigators were not supervisors, since the faculty members and others working under them were not employees of the University but rather assumedly employees of the principal investigator of his project.(38) In its decision at N.Y.U., the Board reaffirmed that determination on the exact same factual basis;(39) however, at N.Y.U., the individuals working on a project are definitely employees of the University, not of the investigator or the project, and are considered as University employees in every legal context imaginable--tax, social security, disability, compensation, and so forth. While the number of individuals affected was relatively small, the Board's error was so explicit that this issue, too, was raised in the course of seeking early judicial review.

Finally, N.Y.U. raised the issue of department chairmen in a very limited context and with substantial division as to the hoped-for result. Since the University was raising a very basic issue as to the employee status of its full-time faculty (which I shall turn to shortly), it could hardly allege that department chairmen had supervisory authority over such faculty. Instead, the University suggested that chairmen might have such authority over part-time faculty and, when the Board ruled to exclude part-timers from the unit, it essentially rendered moot the unit issue concerning chairment.(40)

Unit Stipulations: Quietly Significant Results

In the N.Y.U. case, the use of stipulations afforded a means of satisfactorily resolving various unit issues of considerable potential consequence.(41) In all, there were nineteen stipulations excluding various categories of individuals from the unit. These varied from the obvious and technical to those of significant importance.

One of the largest categories of individuals excluded by stipulation consisted of the entire faculty of the Schools of Medicine and Post-Graduate Medicine. This group alone encompassed over 1,000 individuals.

Another sizable group similarly excluded involved all the University's teaching and graduate assistants. At the time of the stipulation, their contested status would have been a source of notable concern. By this time, however, there have been Board decisions to exclude student personnel in one faculty and three collegiate staff cases.(42)

One of the more significant issues in this area that has yet to be initially tested before the Board was also resolved by an exclusionary stipulation at N.Y.U. That issue involved the unit status of research scientists. Notably, both unions in the N.Y.U. case had originally insisted on their inclusion, and it was only when

their attorneys decided that resolution of this issue would require too much additional time that a stipulation was agreed upon whereby the approximately two hundred and fifty such individuals at N.Y.U. were excluded.

The remaining exclusionary stipulations involved various categories of individuals--visiting faculty, academic, guidance, and psychological counselors, non-compensated faculty, etc.--and I shall not go into details as to each. I will, however, briefly return to two stipulations of exclusion that, at the University's behest, were subsequently rescinded by obtaining a stipulation of inclusion entered into between the time of the original election and the runoff.

Are Faculty Members Employees Within the Meaning of the Act?

For various reasons, the University decided it should raise the broad issue of whether faculty were subject to the jurisdiction of the Labor Board.

Prior to the N.Y.U. case, the Board had reached several important decisions related to this matter. In its decision in C.W. Post, which was thereafter to be cited as precedent, the Board in what were almost asides noted that faculty members have "the usual incidents of the employer-employee relationship and are employees within the meaning of the Act"(43) and, further on in the opinion, that "the policy-making and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors...or managerialeemployees."(44) A thorough reading of the Post Brief indicates that the school never posed the "employee" question as any major issue and had essentially limited itself to suggesting, in a two-paragraph subsection of a point dealing primarily with the local character of the C.W. Post Center, that the Board had not as of that time made clear if it would exercise jurisdiction over a college's professional, as well as non-professional, employees.(45) There followed the Board's decision in Fordham, in which the Board denied the school's detailed argument that its entire faculty should be excluded because their role with regard to faculty personnel matters made them supervisory or managerial employees, the Board finding that the faculty's role in such matters was exercised "only as a group" and this was insufficient to justify exclusion.(46) Then came Manhattan College which spent over 60 pages in its Brief arguing that its faculty should be excluded because their role made the college a self-governing institution, because their faculty were simply not such employees as for whom the Act's advantages were applicable, because faculty members individually exercise supervisory authority and/or because their faculty constituted the management of the college.(47) The Board dealt with the entirety of Manhattan's arguments in a one-sentence footnote that said "we reject the Employer's contention that it would be improper for the Board to assert jurisdiction over faculty members" citing C.W. Post and Fordham.(48)

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There followed from the Board an interesting diversion. Adelphi University had raised the issue of supervisory status solely with regard to a dozen or so faculty members that composed their faculty Personnel and Grievance Committees. The Board denied the supervisory exclusion but for the first time implied that it was troubled by the unique nature of the academic world: " The difficulty here and in Post may have potentially deep roots stemming from the fact that the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world... Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed a genuine system of collegiality would tend to confound us."(49)

It was the first hint from the Board that they themselves were troubled by the application of the Act to the faculty of a mature college or university. Unfortunately, the decision also set forth two interpretations that undercut a more considered resolution of such issues. First, the Board indicated that authority which might be sufficient for exclusion if exercised on an individual basis, simply was not so when that same authority was possessed and exercised as a group.(50) Secondly, the Board questioned the overall degree of the faculty's authority by noting it was subject to the ultimate authority of a university's board of trustees.(51)

It was against this background that the University brought its case before the Board. In a detailed description of both the development of the law and the factual situation here, the University set forth two main arguments: First, that the faculty exercise supervisory authority both individually and collectively and must therefore be excluded. And second, that because the University lacked control over the manner in which the faculty carry out their primary educational responsibilities, faculty are comparable to independent contractors or agents and must be excluded as such.

In its decision, the Board indicated that it considered the supervisory issue already resolved by its decision in C.W. Post and suggested that any implication to the contrary in Adelphi was unwarranted.(52) It then set forth its two prior interpretations, namely authority exercised as a group rather than individually does not suffice; and any such authority if subject to review by a board of trustees is insufficient to justify exclusion. As the Board stated: "We conclude that the faculty qua faculty are not outside the Act's jurisdiction merely because they exercise quasi-collegial authority and possess as a group certain attributes of supervisors."(53)

As for the independent contractor/agent argument, the Board agreed that the test is the possession of control over the manner and means of performance, not merely the result, but found that the faculty member lacks independent freedom with regard to teaching responsibilities since decisions on such matters were subject to the "consensus of the school or department involved," were limited by the obligation to resist introducing controversial matters that have

no relation to his subject," and were subject to the limitations imposed by the responsibilities of the faculty's "professional status."(54) The Board added in a footnote that it needn't consider the faculties' responsibilities with regard to scholarly research and citizenship since these were "ancillary to the [faculty-university] relationship."(55)

In dealing with the supervisory issue, if the Board was in fact saying that supervisory authority would exist but for the fact saying that supervisory authority was exercised only as a group, then a legal issue of substantial import existed for the definition of a supervisor under Section 2(11) of the Act appears to permit no such limitation. And if the Board was saying that the authority exercised by faculty would be sufficient in degree to fall under Section 2(11) but for the fact that it was subject to ultimate review by the Board of Trustees, then a question of logic as well as law existed. Common knowledge suggests that the authority of virtually every traditional supervisor or even managerial employee is subject to ultimate review by a corporation's directors or trustees.

With regard to the independent agent issue, the reasons urged by the Board for concluding the faculty lacked freedom of action in educational matters were unrealistic at best. The range of faculty decision-making, bounded only by the limits of consensus, noncontroversy and professionalism, is immense indeed and probably surpasses that of the traditional independent contractor of other fields. Moreover, the Board's disregard of research and citizenship responsibilities was most curious since a few pages later in the decision the Board cited these same factors as of sufficient import to help justify the exclusion of part-timers.(56)

The University felt quite strongly that various aspects of the Board's decision and particularly its conclusions on the jurisdictional arguments were erroneous. Accordingly, as soon as the essentially pro forma motion for reconsideration was denied, the University sought immediate judicial review.

An Attempt to Enjoin the NLRB Election:

One of the axioms of labor law is that a representation decision of the NLRB cannot be judicially reviewed unless and until a union wins an election and the employer then refuses a demand to engage in bargaining, thus resulting in a finding of an unfair labor practice. Such a finding is a "final order" which enables the Courts to review the Board's decisions relative to the election.

There are, however, two exceptions to the rule based on the Supreme Court's decision in Leedom v. Kyne and the 2nd Circuit Court of Appeals' decision in Fay v. Douds.(57) In the former, the Court allowed an injunction where the Board acted clearly "contrary to a specific prohibition in the Act" and in the latter, the Court added likewise where the Board's action amounted to a violation of a significant constitutional right. Subsequent court decisions have made

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explicitly clear that these two exceptions are to be interpreted extremely narrowly and, in fact, an injunction to bar an election has apparently never been issued to an employer, with the exception of a single district court decision in the District of Columbia in 1966.(58) Interestingly, hundreds of attempts to seek injunctions against elections have been denied, including an attempt just a few months previously by the U.F.C.T. which unsuccessfully sought to enjoin the counting of ballots in the original election at C.W. Post.(59)

Shortly after the NLRB's Decision and Direction of Election was issued in late July 1973, the 2nd Region of the Board began making preparation for the holding of the election. On September 7th, the University moved for an Order to Show Cause for a preliminary injunction against further preparations for the election.(60) After two lengthy sessions in the chambers of Judge Milton Pollack in which the University detailed the issue and some of its salient features, the Order was signed and the judge strongly "suggested" to the Board's attorney that they discontinue further preparations for an election until the motion for a preliminary injunction could be heard. The Board immediately compiled and did not recommence preparations until after Judge Pollack's decision was issued.

In its Brief and argument to the Court on the motion for a preliminary injunction, the University argued that the Board's decision was enjoinable in four specific regards. First, in denying the supervisory exclusion for faculty, the Board contravened the Act by its improper reliance on its own interpretations that authority exercised as a group did not fall within the supervisory definition of the Act, and that authority subject to ultimate review by a board of trustees is insufficient for exclusion. Secondly, that in denying the supervisory exclusion to those librarians who (1) exercised supervisory authority only over non-unit employees and (2) spent less than 50% of their time in so doing, the Board contravened the Act which requires a supervisory exclusion where authority is exercised over any employees of the employer (whether or not bargaining unit members) and requires such exclusion wherever authority is possessed, regardless of the amount or degree of its being exercised. Thirdly, that in denying a supervisory exclusion to principal investigators on the ground that the individuals under them were not employees of the University, the Board was acting without a factual foundation, thereby constituting a denial of due process. Finally, that in allowing the law school faculty to vote on whether they wanted a separate or overall unit, the Board was violating the Act by delegating the Board's non-delegable responsibility of deciding the appropriate unit itself.

Almost inevitably, the Court denied the University's request for an injunction.(61) With regard to the supervisory authority of faculty, librarians and principal investigators, the Court lumped them all together and found that the Board's decision never "specifically characterized" any of these groups as supervisors.(62) I would note the following, however: As to faculty, while it is true that the Board's decision relative to them did use the terms "quasi-collegial authority" and "certain attributes of supervisors," since

the various attributes of authority which justify supervisory status under the Act are to be read in the disjunctive, it is questionable if the Board intended such a distinction.(63) I would take even stronger issue with the Court as its comment pertains to librarians. A fair reading of the decision seems to indicate that the Board would have regarded librarians as "supervisors" but for the Board's imposition of its 50% I would add that the Board has explicitly termed such librarians as supervisors in another case involving the University of Chicago that has already reached the Courts in the context of an unfair labor practice.(64)

The issue that appeared to come closest to achieving the wellnigh impossible pre-election injunction was the law school, however. The Court never could find a specific legislative basis for the Board's delegation to the law faculty of a choice on the final unit although the Court stated that such delegation "seems perfectly in keeping with the spirit and thrust of the Act, and in any case that issue is more properly reserved for the Court of Appeals on conventional judicial review." As the Court concluded: "It is enough for now for this Court to recognize only that the Board has not so specifically contravened its statutory mandate so as to invoke the narrow exception of Kyne."(65)

The Court's decision came down almost precisely two years after the petition for an election was filed. It was now time to proceed to that election.

Campaign Communications to the Faculty:

The University publicly opposed faculty unionization. By actively asserting the position that unionization is not desirable and would be opposed, the University sought to accomplish two results. First, it hoped to instigate widespread interest, debate, and analysis leading to a more substantial turnout. One theory is that related to the outcome, since it is often the case that those favoring unionization will always get to the polls while the potential no-union voter will cast a ballot only if sufficiently motivated. Secondly, the University's opposition might encourage groups of faculty members who would choose to advocate a no-union position. Both the high turnout and the activities of anti-union faculty seemed to have greatly affected the result at N.Y.U. and I shall briefly return to each of these factors.

The actual campaign might be thought of as having consisted of four elements. The first can be described as statements of position which primarily involved a brief opening and closing statement from the President urging a rejection of unionization. The second element was informational. For example, a bulletin issued during the campaign made clear--in question and answer format--such often unknown as: the fact that the election is determined by a majority of those voting regardless of the percentage of eligible voters who cast a ballot, that the results are binding on all eligible faculty regardless of whether they actually voted, and that an elected labor organization cannot be removed for at least a year and often up to three years subsequently. Both the positional and informational elements of the

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campaign appeared to arouse voter interest and encouraged the efforts of faculty groups opposed to unionization.

A third element at N.Y.U. can be described as public relations. Advantageous conditions already achieved by the faculty in terms of economics, status, and governance authority were described by the administration. This was aimed to suggest a continuing concern on the part of the University for faculty interests and, within permissible legal limits, offered a basis for expectation of even more substantial improvements based on the record of performance of recent years. The goal was not merely to impress faculty with what they already have. Indeed, it was felt that there are few situations where unions cannot promise something more, where faculties feel they do not deserve more, or where individual faculty member will look upon what he is told the average faculty member in his institution has with increased resentment because he now realizes he has less.

That brings us to the fourth element which involved the University's continuing discussion of various aspects of unionization. To me, this element seemed most crucial. In an area where reliable statistics are unavailable, it may often be true that more people are motivated to vote against unionization because they dislike various aspects of it or are concerned with certain of its potential results than are motivated by their feeling of satisfaction with any university or administration.

In addition to the already described material, the University's written campaign prior to the initial election essentially consisted of four several-page essays by Dick Netzer, Dean of N.Y.U.'s Graduate School of Public Administration, covering in broad terms, his views on the following topics: misconceptions about the goals and success of faculty unions; the salary and fringe benefit picture at N.Y.U. and unionization's likely effect upon it; the faculty's already achieved role in governance at N.Y.U.; and a summary, clarification and responses to several issues raised in previous bulletins. In the campaign preceding the "runoff" election, there was another letter from Dick Netzer, this time generally on the subject of union democracy and truthfulness. In addition, there were several one and two-page bulletins from Richard Semeraro, N.Y.U.'s Associate General Counsel, on the same general topic, as well as on various specific disadvantages of unionization. Finally, there were two additional letters from the President dealing with some specific issues on the N.Y.U. campus, such as the University's budget crisis and the recently reduced mandatory retirement age.

Of special interest was the campaign against unionization waged by several faculty members who grouped together in what they called "The Faculty Committee for Self Governance." While the group issued only a single letter late in the campaign preceding the initial election, they issued six bulletins between the initial election and the runoff. One pointed out the U.F.C.T.'s recently negotiated contract at the University of Hawaii was so unsatisfactory that it was

overwhelmingly rejected by Hawaii's faculty. Another simply listed the undesirable aspects of unionism. Yet another suggested that substantial improvements could be achieved without the need for unionization. Yet another simply quoted brief statements by several younger non-tenured faculty members explaining why they were opposed to unionization. The issues were posed not in the context of what the administration urged but rather what a significant group of faculty colleagues believed to be the best course of action.

Obviously, no one can say with certainty what issues or styles were most effective.(66) What is reasonably certain, however, is that the events of the campaign did have important effects on the final vote.

Round I: The A.A.U.P. is Eliminated

The long-awaited election at N.Y.U. was set by agreement of the parties for November 14-15, 1973. A technical dispute over whether the Board's decision eliminated not only the thousand-plus part-timers but also some 80 or so "half-timers" in the School of Dentistry arose at a pre-election conference in mid-October. This was satisfactorily resolved prior to the election when the 2nd Region, after twice reversing itself, ruled that half-timers were also encompassed within the Board's exclusion of part-timers.(67) Another question arose with regard to whether librarians working in the law school would vote in the law school unit with faculty or in the overall unit with the other eligible librarians. Here too, the 2nd Region agreed with the University's position placing them in the law school unit.

In addition, the University sought and obtained from the Board lengthy voting hours in the hope of thereby encouraging the maximum voter turnout. Polls were opened at five University locations (including one poll for the law school) and were kept open for more than usual lengths of time over a two-day period. The Board met the request to supply sufficient agents to handle all potential problems and the election came off with virtually no difficulties or incidents.

As previously noted, the law school opted for representation by their own faculty association in their separate unit. The overall University unit with approximately 1,070 eligible voters case 310 votes for the U.F.C.T., 255 for the A.A.U.P., and 299 for no -union, with 42 unresolved challenged ballots.(68)

Under NLRB rules, since no choice received a majority of votes cast, the choice with the least votes, namely the A.A.U.P., was eliminated and the Board began making preparations for a runoff between the two choices having the highest number of votes, the U.F.C.T. and no-union. Before that runoff would be held, however, the University raised several important points that had a direct bearing on the election's outcome.

Mail Balloting:

By the end of the first round of balloting, it was clear that the extension of mail balloting to faculty on leave of absence would be both helpful and necessary to assure an effective franchise to an additional eighty-plus faculty, most of whom were tenured members at the higher ranks. Accordingly, immediately after a runoff election was indicated, a request for mail balloting was made covering faculty on leave as well as away from the city on the days of the election while attending educational conferences. To my knowledge, mail balloting had not been granted by the Board at prior campus elections, although an agreement of the parties at Syracuse to permit such balloting was accepted.(69) Moreover, under the Board's election guidelines, mail ballots are to be extended only to "employees who cannot vote in person because of 'employer action'" and are not to be sent to those "on leave of absence due to their own decision or condition."(70) In fact, soon after the U.F.C.T. made clear its opposition to mail balloting for faculty on leave citing the above referred to guidelines, it was reported that the Regional Director had tentatively decided to deny mail ballots. However, the University explicitly detailed to the Regional Director how the scholarly activities performed by a faculty member during his period of leave amounted to an extension of his educational responsibilities to the University. The University maintained that such leaves should be considered not those for which mail balloting was unavailable, but as absences that were essentially necessitated by responsibilities to the University. The Regional Director ultimately agreed, enabling mail ballots to be sent to all those on leave, plus over a score more who subsequently indicated they would be away at conferences on the dates for the runoff election.

Directors: Out Again - In Again Voters

During the course of the original hearings, the University had sought and obtained a stipulation from all parties providing for the exclusion of numerous directors who exercised a certain degree of administrative responsibilities. Now the University wanted these directors included for a variety of reasons, including the fact that department chairmen, whose administrative responsibilities were generally comparable were found by the Board to be eligible.

After much discussion, a new stipulation of all parties was obtained, withdrawing the previous stipulation of exclusion and replacing it with a stipulation of inclusion. This new stipulation was accepted by the Board in Washington, which thereupon granted the University's motion for a unit modification permitting approximately 40 additional voters.(71)

The Time Framework:

From its inception, the seriousness, complexity and relative novelty of the issues involved in the N.Y.U. case necessitated particularly lengthy hearings and decisional consideration. Thus, the petition for an election was filed in September of 1971.

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Preliminary matters prevented the hearings from beginning before January 1972 and they continued until late April, after which the many issues raised had to be briefed by all parties. Then, too, the nature of the case required it to be transferred from the Board's regional office to Washington for initial decision. It subsequently became clear that the Board found most troubling and time-consuming the issues raised with regard to part-timers. Finally, rarely granted oral argument on part-timers was ordered for April of 1973. With all the necessary intermediate steps, the decision did not come down until July of 1973, twenty-two months after the petition was originally filed with the National Board. Even after the Leedom v. Kyne injunction was denied, it was still necessary to await the faculty's return from summer vacation, and this, combined with the inevitable complexities of so large and important an election, caused another four months to go by before the initial election was held.

When a runoff was called for after the mid-November election provided inconclusive, the union demanded utmost expedition and the Board's usual procedures do in fact call for a runoff to follow the initial election as soon as possible and generally well within thirty days of that first election.(72) However, because of the time required in connection with the unit modification for directors as well as the fact that the receipt of mail ballots would necessarily hold up the count anyway, the runoff could not be scheduled until mid-January of 1974. (I would note that it was during this period between elections that campaigning was probably most intense, particularly by the "Faculty Committee for Self-Governance.")

In looking back, one might wonder if the result would have been different if the election had been held in the usual periods of time, back in 1971 when the University was perhaps at the nadir of its financial crisis, or 1972 when salaries were frozen and hundreds of faculty were in the midst of terminal status or mandated end-of-year retirements because of the University's financial crisis. The legal process, however, had carried the election far into the 1973-74 academic year.

The Runoff Election:

The manual part of the election was held on what may have been the two worst weather days of the year, January 9-10, during the midst of a major snow storm. Further complicating the problem of obtaining maximum voter turnout was the intentional abstentions of some A.A.U.P. members once their organization was eliminated from the ballot.(73) (The local A.A.U.P. chapter itself adopted an official "no position" on the runoff election.)

Because the University felt that maximum voter turnout was essential, a monitoring system was set up whereby continuous reports were received on the number of individuals who had thus far voted at each poll.(74) When early reports indicated a slump in hoped-for

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voter turnout, a meeting was held with key administrators who initiated an 11th hour telephone campaign to instigate maximum turnout.(75)

Manual voting at the last poll ended at 8:15 p.m. on January 10th. Mail ballots from faculty members on leave in virtually every continent of the globe had to arrive at the 2nd Region of the Board by the close of business on January 15th in order to be counted. On the morning of January 16th, after resolving as many challenged ballots as possible, the count began. By 11:30 in the morning, the tally was done: The U.F.C.T. had 404 votes; No Union had 507; 21 remained challenged.(76) Despite the weather and attendant problems, about 8% of the eligible electorate had turned out. No objections having been filed within five working days following, a Certification of Results was shortly issued.(77)

A Look Ahead:

The most immediate legal problem potentially at hand involves the law school. Since their faculty is technically organized, the question remains as to whether they will demand collective bargaining or, having achieved their desire not to be immersed in an overall unit, will continue to seek progress through existing structures and channels. If they choose the former course, the University would then have the option of refusing to bargain which could set the stage for judicial review of very important jurisdictional and unit issues.(78)

As to the overall unit, there is little doubt that attempts at unionization will not disappear. Both the A.A.U.P. and U.F.C.T. have invested much money, effort, and prestige, and many will try again after the one-year election bar expires.(79) This year will be an important test of N.Y.U.'s traditional structures of self-governance.

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Notes

(1) N.Y.U. is not only the largest but in many respects the most prestigious private college or university whose organization has yet been attempted. Moreover, the attempt at unionization involved both the A.A.U.P. and the U.F.C.T., each of which appeared to invest a particularly substantial amount of money, effort, and prestige into the N.Y.U. case.

(2) The legal "team" for N.Y.U. consisted of Henry Clifton, Jr. (of Clifton, Budd & Burke), Miguel de Capriles and Richard Semeraro, respectively General Counsel and Associate General Counsel of the University, and myself. While I have sought to describe the case primarily from a legal perspective, needless to say, many "non-lawyers" in the University's administration played absolutely essential roles in the overall outcome. Let it also be perfectly clear that all interpretations and opinions hereafter expressed I alone take responsibility for and they do not necessarily reflect the views of others or of the University.

(3) The dollar standard for NLRB jurisdiction over a private college or university is gross annual revenue from all sources (exclusive of contributions restricted by the donor) of $1 million or more, 183 NLRB 153.

(4) Under State Board rules, if the combined votes from the two unions comprise a majority of the votes cast, the runoff is between the two unions. Under NLRB rules, the runoff is between the two choices receiving the highest number of votes.

(5) The State Board has no specific administrative guidelines on the necessary showing of interest. While it will require some evidence of interest, it has generally accepted as adequate authorization cards from much less than 30% of the eligible voters.

(6) While the authorization card requirement is considered by the Board to be an administrative matter concerning which it will disclose no details to the employer, there are some indications that at the time it filed its petition, the A.A.U.P. had authorization cards from between 50 to 60 percent of the full-time faculty.

(7) See University of Detroit, 193 NLRB 95, footnote 7, at p. 11.

(8) Manhattan College, 195 NLRB 23, at p. 3.

(9) C.W. Post Center of L.I.U., 189 NLRB 109; L.I.U. (Brooklyn Center) 189 NLRB 110; University of New Haven, 190 NLRB 102; Detroit University, 193 NLRB 95; Fordham University, 193 NLRB 23; Manhattan College, 195 NLRB 23; Florida Southern College, 196 NLRB 133; College of Pharmaceutical Sciences, 197 NLRB 142; C.W. Post Center of L.I.U. (Supplemental Decision) 198 NLRB 79; Tusculum College, 199 NLRB 6; (Catholic University (Law School) 201 NLRB 145; Catholic University (Law School) (Clarifying Decision) 202 NLRB 111.

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(10) Order dated July 16, 1971, denying A.A.U.P. Petition for Rule-Making.

(11) University of New Haven; Op. cit. at p. 4.

(12) Notably, the A.A.U.P. adopted a similar position on part-timers.

(13) N.Y.U., 205 NLRB 16 at p. 10 with Fanning & Miller in separate dissenting opinions.

(14) It has been cited as controlling at Fairleigh Dickinson University, 205 NLRB 101; Catholic University (Law School) 205 NLRB 19; and University of San Francisco (Law School) 207 NLRB 15.

(15) C.W. Post (Supplemental Decision 198 NLRB 79; Catholic University (Clarifying Decision) 202 NLRB 111.

(16) Detroit University, op. cit. at p. 7.

(17) Ibid.

(18) Supra at p. 6.

(19) C.W. Post Center (Supplemental Decision) op. cit.; Catholic University (Clarifying Decision) op. cit.

(20) N.Y.U., op. cit. Footnote 9 at p. 9.

(21) N.Y.U., op. cit. Footnote 12 at p. 12.

(22) C.W. Post Center, op. cit.; L.I.U. (Brooklyn Center) op. cit.; Fordham, op. cit.; Tusculum, op. cit. The Board has permitted, however, a unit limited to professional and non-professional librarians in a case in which they alone were sought by the only labor organization involved, although it is still too early to tell how much importance the Board placed on the somewhat unusual factual circumstances of the institution involved. See Claremont Colleges, 198 NLRB 121.

(23) The Labor Management Relations Act provided only that "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in expressing the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining..." Note also that the issue is not whether the unit is "appropriate," even if an alternative unit would also be appropriate and perhaps more so.

(24) N.Y.U., op. cit. at p. 13.

(25) Ibid.

(26) Fordham University, 2-RC-16383.

(27) Adelphi, op. cit. at pp. 19-20.

(28) N.Y.U., op. cit. at p. 14. I would note that Fordham is raising this issue as well in its now pending case both with regard to librarians and with regard to department chairmen relative to the latter's authority over part-time faculty. A recent U.S. Supreme Court decision would appear to have considerable implication with regard to the Board's underlying rationale for its decisions on this issue. NLRB v. Bell Aerospace, Division of Textron, Inc. 72-1598. 42L.W.4564.

(29) Fordham University, op. cit.; Catholic University, op. cit.; Syracuse University, 204 NLRB 85; University of San Francisco, 207 NLRB 15.

(30) The other two members, Fanning and Panello, raised several questions about the legislative basis for this novel approach, although their primary concern was not that it permitted a separate unit (which they were also in favor of) but rather their view that a unit member's vote was only appropriate) in a severance-type situation where the distinct group could elect separate representation but not separate non-representation.

(31) Syracuse; op. cit. at p. 8.

(32) Fordham; op. cit., Footnote 11 at p. 12.

(33) Syracuse; op. cit. at p. 9.

(34) So with the A.F.T.'s request to exclude the dental school at Fairleigh Dickinson 205 NLRB 101.

(35) Fairleigh Dickinson, op. cit. at p. 7.

(36) At N.Y.U., for example, while 40 of the 44 law faculty members voted for a separate unit and 27 of them voted for representation within such separate unit, my unofficial count of their ballots showed that in response to the question, if a majority votes for an overall unit, do you wish to be represented, nearly 90% voted no.

(37) Manhattan College, op. cit. at p. 6.
Tusculum College, op. cit. at p. 16. This issue is now being raised again at Fordham University.

(38) Fordham, op. cit. at p. 8.

(39) N.Y.U., op. cit. at p. 15.

(40) N.Y.U., op. cit. at p. 16.

(41) The Board's general policy is to accept stipulations even if they result in variations from the unit the Board would itself have determined; the infrequent exception is for variations that the Board regards as being impermissibly contrary to the purposes of the Act.

(42) The faculty case was Adelphi University, op. cit. at p. 7; the staff cases were Georgetown University, 200 NLRB 41; Cornell University 202 NLRB 41; and Barnard College (Decision on Review) 204 NLRB 155.

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(43) C.W. Post; op. cit. at p. 2.

(44) Supra at p. 5-6.

(45) Brief of C.W. Post in 29-RC-1488 at p. 5.

(46) Fordham, op. cit. at p. 7.

(47) Brief of Manhattan College in 2-RC-15630 at pp. 10-28, 33-78.

(48) Manhattan, op. cit., Footnote 2 at p. 2.

(49) Adelphi, op. cit. at pp. 33-34.

(50) Supra at p. 33.

(51) Supra at pp. 34-35.

(52) N.Y.U., op. cit. at p. 3-4.

(53) Supra at p. 5.

(54) Supra at p. 6.

(55) Supra in Footnote 5 at p. 6.

(56) Supra at p. 11.

(57) 358 U.S. 184 (1958) and 172 F.2nd 720 (1949), respectively.

(58) Bullard Company v. NLRB, 253 F. Supp. 391 (1966).

(59) U.F.C.T. Local 1460 v. Miller, et. al., Index No. 73-1091, decided May 15, 1973 and reported in N.Y. Law Journal of June 6, 1973.

(60) NLY.U. v. NLRB; Miller, et. al., U.S. Dist. Ct. (S.D.N.Y.) 73 Civ. 3918.

(61) Supra; Order dated Sept. 20, 1973, 364 F. Supp. 161 (1973).

(62) Supra at p. 7.

(63) See, for example, Xaloy Inc. 175 NLRB 693, I would note that the "employee" issue will soon be subjected to judicial review in a case involving Wentworth College of Technology (NLRB Case No. 1-RC-12,627) a small college located in Boston. Wentworth was organized by the A.F.T. in 1973 and has not "refused to bargain," resulting in an unfair labor practice finding which the NLRB must now move to enforce in the Court of Appeals for the 1st Circuit. During the course of that review, Wentworth has indicated it will "question the validity of [the Boards] reasoning in cases such as N.Y.U. and Adelphi to the effect that faculty are not supervisory or managerial even though they, as a group, possess and exercise powers described within the supervisory indicia of Section 2(11) of the Act."

(64) U.S. Court of Appeals (7th Circ.) Index No. 73-1788. Interestingly, the case reached the Court because the University was found by the Board to have committed an unfair labor practice for supervisory tainting by certain librarians. The University is seeking review in what essentially amounts to a plea that it be found to have committed additional unfair labor practices because of supervisory tainting by still other librarians. Their status as supervisors revolves around the same Board policies on authority over non-unit employees and the amount of its exercise as were raised at N.Y.U.

(65) N.Y.U. v. NLRB, op. cit. at p. 9.

(66) On the whole, the union's campaign was as capably and professionally done as any I've yet observed and many of their own pieces were models of effective union communication.

(67) Letter of October 26, 1973 from Sidney Danielson, Regional Director.

(68) Originally, there were six additional ballots challenged by the A.A.U.P. but the A.A.U.P. subsequently withdrew the challenge to these ballots to prevent a lengthy delay in the inevitable runoff between the U.F.C.T. and no-union.

(69) Syracuse, 3-RC-5511.

(70) Section 11336.1 of the Board's Field Manual Guidelines.

(71) A somewhat analogous problem was involved in the Board proceedings to resolve the challenged ballots at Fairleigh Dickinson (22-RC-5310 and 5334) where the University and the A.A.U.P. unsuccessfully sought to withdraw their previous stipulation of exclusion covering the faculty of a small experimental college, while the U.F.C.T. successfully demanded adherence to the original stipulation.

(72) See Section 11350.3 of the Board's Field Manual Guidelines.

(73) I'm advised that approximately 60 individuals who voted in the original election chose not to vote in the runoff though, of course, whether these primarily represented A.A.U.P. abstentions or were motivated by other reasons can only be surmised.

(74) I would caution, however, that it is impermissible to ask an individual either how or even whether he voted or to place supervisory personnel in the vicinity of the polling places.

(75) Reports from the polls indicated nearly 200 additional voters appeared at the polls within the hour and a half following the telephone campaign, substantial increase over the previous rates of flow for that time period

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(76) In the runoff, the U.F.C.T. therefore achieved 94 more voters than in the initial election, while No Union received 208 more. It is likely that most of the U.F.C.T.'s extra votes came from previous A.A.U.P. voters who accepted the U.F.C.T. as an alternative means of achieving collective bargaining. Most of the 208 additional No Union votes likely came from other former A.A.U.P. voters, a score-plus non-mail voters who didn't vote in the first election but chose to vote in the runoff, newly included directors, plus faculty who were first given mail ballots in the runoff election.

(77) Sections 11392.1 and 11470 of the Board's Field Manual Guidelines.

(78) It is very possible, however, that at least the employee issue will have already received its first judicial scrutiny in the 1st Circuit Court of Appeals in the action currently being brought by Wentworth College of Technology, op. cit. At the time of this writing, the Board's General Counsel has already moved for summary judgment on the unfair labor practice evolving from the College's refusal to bargain.

(79) Section 9(c)(3) of the National Labor Relations Act as amended.